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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No. 79-6672

KERRY DALE CASEY, Appellant
v.
ALLEN AULT, EXECUTIVE DIRECTOR,
COLORADO DEPARTMENT OF CORRECTIONS, Appellee

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The appellant, Kerry Dale Casey, who is now held in the Colorado State Penitentiary, asks leave to file ~~the~~ attached Jurisdictional Statement on appeal from the United States Court of Appeals for the Tenth Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53 and U.S.C. §3006A(d)(6).

The United States Court of Appeals for the Tenth Circuit has appointed this counsel under the Criminal Justice Act to represent the Appellant.

Respectfully submitted

Gene Beville
Twelve Twenty Monaco Parkway
Denver CO 80220
(303) 377 4161
Counsel for Appellant

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COLORADO DEPARTMENT OF CORRECTIONS, Appellee

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JURISDICTIONAL STATEMENT

Gene Beville
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Denver, Colorado 80220
(303) 377 4161
Counsel for Appellant

May 1980

IN THE
SUPREME COURT OF THE UNITED STATES
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KERRY DALE CASEY, Appellant
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ALLEN AULT, EXECUTIVE DIRECTOR,
COLORADO DEPARTMENT OF CORRECTIONS, Appellee

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JURISDICTIONAL STATEMENT

Kerry Dale Casey, the appellant, appeals from the final judgment of the United States Court of Appeals for the Tenth Circuit, dated and entered February 27, 1980, affirming the denial of a petition for a writ of habeas corpus in the United States District Court for Colorado. The petition alleged violations of appellant's due process and equal protection rights guaranteed by the Fourteenth Amendment of the Constitution of the United States.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth District, which appears in the appendix hereto, p. 1a, infra, is not reported. The opinion of the United States District Court for Colorado, which appears in the appendix hereto, p. 7a, infra, is also not reported.

The opinions of the Colorado Supreme Court, the first affirming appellant's conviction, and the second affirming the denial of his post-conviction relief motion, which appear in the appendix hereto, p. 13a and 17a, are reported at Colo., 521 P.2d 1250 (1974) and Colo., 563 P.2d 2 (1977).

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on February 27, 1980. See p. 1a, Infra.

A notice of appeal to this Court was duly filed in the said Court of Appeals May 27, 1980. See p. 21a, Infra.

This appeal is being docketed in this Court within 90 days from the judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(2).

QUESTIONS PRESENTED

Whether the erroneous manslaughter instruction was violative of the due process and equal protection rights of the Fourteenth Amendment of the Constitution of the United States.

To resolve these questions, two factual issues must first be decided. All the courts below have held that the "facts of the case" in Casey are different from Morant, and different from Loger, deeming the "facts of the case" to be the activities leading up to and during the murder. Casey contends that these facts are not different in the sense of the impact of the erroneous manslaughter instruction. But of far greater import, Casey contends that the only controlling facts are that the trial judges found that the evidence in all three cases was sufficient for a jury conviction of manslaughter. Thus the grave defect in the manslaughter instruction impacted the jury considerations in each of the three cases.

The second factual issue is whether the Morant decision prior to the Casey decision was controlling as to Casey. If so, the whole question of retroactivity becomes moot. If not, then the question of retroactivity under Colorado statute and rule must be decided to determine whether federal due process and equal protection were denied Casey.

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment, United States Constitution:

§1. . . . No state shall . . . deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

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STATEMENT OF THE CASE

This is an appeal from a judgment affirming the denial of a petition for a writ of habeas corpus. In February 1972, the appellant, Casey, was convicted of first degree murder in a Colorado state court. Casey did not object to the manslaughter instruction given to the jury. Later, in August, 1972 the state supreme court held that giving "a nearly identical"[1] manslaughter instruction was plain error, highly prejudicial and could have had the effect of completely nullifying the consideration by the jury of the voluntary manslaughter verdict. People v. Morant, Colo., 499 P.2d 1173, 1174-1175 (1972), also holding that the offending paragraph was a garbled version of the statute characterized in a 1970 case as "demonstrating what is not involuntary manslaughter." Sawyer v. People, Colo., 478 P.2d 672.

Casey raised the issue of the erroneous manslaughter instruction on appeal as plain error, but the state supreme court refused to consider this issue for the first time on appeal, absent plain error. In the words of the court below (p. 2a):

> "His appeal on this issue relied heavily on People v. Morant [supra]. The Colorado Supreme Court affirmed the conviction. Upon examining all the instructions the court found no plain error and stated that 'under the facts of this case' the instructions provided the jury 'an adequate and correct guideline of the law.'"

In 1975, in People v. Loger, supra, the state supreme court again found the "nearly identical" manslaughter instruction plain error, holding:

1 Reference to the manslaughter instructions given in Loger and Morant by the state supreme court in People v. Loger, Colo., 535 P.2d 310, at 311 (1975), the manslaughter instructions in Loger and Casey being essentially identical. See pgs. 23 a and 24 a.

> The instruction given in this case [essentially identical to the instruction given in Casey] differs from that given in Morant only by the insertion of the word "involuntary" in the last sentence of this instruction. Clearly, the instruction given in this case involves error which is even more grievous than the error in Morant because the jury here is, in effect, instructed that the "involuntary killing . . . shallbe deemed and adjudged murder." This instruction therefore could have reasonably nullified any consideration the jury may have given to a manslaughter verdict under the evidence inthis case.

The jury was instructed in all three cases, Morant, Loger and Casey on voluntary manslaughter; in both Loger and Casey on involuntary manslaughter as well. See pgs. 25 a and 26 a, **infra.** Thus, the facts in all three cases supported the giving of a manslaughter instruction.

After the Loger decision, Casey moved for post-conviction relief. The trial court denied the motion and the state supreme court affirmed the denial, holding that the issue had been decided in the appeal of his conviction.

Casey then filed an application for a writ of habeas corpus in the United States District Court for Colorado. In denying the petition, the district court found that the state supreme court did consider the erroneous manslaughter instruction issue on the direct appeal albeit that the court stated in its opinion;

> [9] Concerning the other jury instructions which defendant no claims were erroneous, no specific objection was made prior to their submission to the jury . . . Absent plain error, we will not consider these arguments on appeal. . . . After examining all the instructions, we do not find plain error in the giving of any of the instructions.

People v. Casey, supra, 521 P.2d at 1253. This holding came after the plain error ruling in Morant in the same factual context - evidence to support a manslaughter conviction - and the "nearly identical" manslaughter instruction. Then Loger came down removing any question whatsoever as to the same factual predicate and the essentially identical manslaughter instruction.

THE QUESTIONS ARE SUBSTANTIAL

The cases involving habeas corpus relief in the federal courts for claims of violations of United States Constitutional due process and equal protection rights in the state courts, especially regarding jury instructions and post-conviction relief, critically need clarification and guidance by this Court.

CONCLUSION

Three defendants appealed the same erroneous instruction in the same factual contexts; the first won; the second lost; and the third won. For these reasons, this Court should summarily reverse the judgment of the court below, or note probable jurisdiction of this appeal.

Respectfully submitted,

Gene Beville
Twelve Twenty Monaco Parkway
Denver, Colorado 80220
Counsel for Appellant

May 1980

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit
FEB 27 1980
HOWARD K. PHILLIPS
Clerk

No. 78-1618

KERRY DALE CASEY,

Petitioner-Appellant,

v.

ALLEN AULT, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal From The United States District Court For The District Of Colorado (D.C. Civil Action # 78-0394)

Gene Beville of O'Donnell & Beville, Denver, Colorado, for Appellant.

J. D. MacFarlane, Attorney General, David W. Robbins, Deputy Attorney General, Edward G. Donovan, Solicitor General, and Lynne Ford, Assistant Attorney General, State of Colorado, on the brief for Appellee.

Before SETH, Chief Judge, LOGAN and SEYMOUR, Circuit Judges.

SETH, Chief Judge.

This is an appeal from a denial of a petition for a writ of habeas corpus. On February 29, 1972, defendant was convicted by a jury of first degree murder in a Colorado state court. The trial judge gave an instruction which defined the lesser offenses of voluntary and involuntary manslaughter. Defendant made no objection to this instruction, but on appeal he argued it was plain error. His appeal on this issue relied heavily on People v. Morant, 499 P.2d 1173 (Colo.). The Colorado Supreme Court affirmed the conviction. Upon examining all the instructions the court found no plain error and stated that "under the facts of this case" the instructions provided the jury "an adequate and correct guideline of the law." People v. Casey, 521 P.2d 1250 (Colo.).

In 1975, the Colorado Supreme Court held that a virtually identical manslaughter instruction was plainly erroneous. The court reversed a conviction of first degree murder, holding that as applied to the facts the instruction presented a confusing and contradictory statement of the law. People v. Loger, 535 P.2d 210 (Colo.). Relying on Loger Casey filed a motion for post-conviction relief which was denied and the state supreme court affirmed. People v. Casey, 563 P.2d 2 (Colo.). Subsequently, Casey petitioned for a writ of habeas corpus in the United States District Court for Colorado. This petition asserted that the manslaughter instruction, and the

Colorado Supreme Court's refusal to give retroactive application to Loger was a violation of due process. The United States District Court ruled that defendant failed to show a violation of due process and accordingly denied the writ. We affirm.

Habeas corpus relief is unavailable for errors in state court jury instructions unless the error has violated the due process clause of the fourteenth amendment. Gillihan v. Rodriguez, 551 F.2d 1182 (10th Cir.) (collecting cases); Hammil v. Tinsley, 202 F. Supp. 76 (D. Colo.). To support an assertion of violation of due process rights it is not sufficient to argue that an instruction is "undesirable, erroneous, or even 'universally condemned.'" Cupp v. Naughten, 414 U.S. 141, 146. It is apparent that "not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a 'failure to observe that fundamental fairness essential to the very concept of justice.'" Donnelly v. DeChristoforo, 416 U.S. 637, 642 (quoting Lisenba v. California, 314 U.S. 219, 236). The question, therefore, "is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Cupp v. Naughten, 414 U.S. 141, 147.

We must hold that the challenged instruction, considered with the others then given and with the facts, does not constitute a violation of due process under the standards set forth in the cases cited above. Instruction No. 14 which followed the one challenged described the several homicide categories. Thus we agree with the Colorado Supreme Court and the United States District Court that neither the instructions together nor the one challenged violate due process.

The remaining issue is the retroactive application of People v. Loger, 535 P.2d 210 (Colo.), and People v. Morant, 499 P.2d 1173 (Colo.). Morant was decided after petitioner's conviction but before his appeal was decided. Loger was decided after Morant and after petitioner's appeal had been decided.

There is a substantial question as to whether Morant is pertinent because the court was there concerned with the giving of a voluntary manslaughter instruction - an instruction into which the trial court had inserted part of a definition of involuntary manslaughter. The Loger decision was a considerable time later, and its application would clearly be retroactive. Perhaps the best analysis of this issue is in the Loger opinion.

The Colorado Supreme Court in its consideration of Casey's post-conviction proceeding said in part concerning the challenged instruction at 563 P.2d 3:

> The issue presented here was considered and resolved by this court in the previous appeal. A defendant is not entitled to a second appeal on the same issue. (Citation omitted.)
>
> We are not unmindful of the fact that since the announcement of the previous People v. Casey, supra, we announced People v. Loger, 188 Colo. 291, 535 P.2d 210 (1975), in which we held, under the particular facts there presented, that the giving of a similar instruction was plain error . . . .

Thus the issue was considered and the court declined to apply Loger retroactively. The court in its opinion refers, with emphasis, to the facts in the case before us. Indeed, any instruction must be considered in the context of the facts developed at trial. This is especially significant in the type of crime considered in the three cases.

Casey was convicted on the following evidence. He and the victim were drinking at a bar and left the bar together in the victim's car. He struck the victim, who was driving, with a wine bottle. (The Government contended this was part of an effort to rob the victim; defendant contended it was provoked by a homosexual advance.) The victim got out of the car, and Casey took the car, drove a short distance, made a U-turn, accelerated off the road into an adjacent field where the victim was walking, and struck him at high speed. Casey neither applied the brakes nor did he stop immediately after striking the victim. As applied to these facts, the "ailing" instruction

did not infect the entirety, nor even significant parts of the trial. By comparison, the facts in Loger present quite a different situation. See 535 P.2d 210.

A state may choose for itself whether it will give retroactive application to a "law." Wainwright v. Stone, 414 U.S. 21. See generally Linkletter v. Walker, 381 U.S. 618. It is immaterial as to due process whether the change is in the form of constitutional amendment, statutory enactment, or judicial interpretation. Gaitan v. United States, 317 F.2d 494 (10th Cir.). See also Johnston v. United States, 424 F.2d 505 (10th Cir.). Nothing in the record indicates the Colorado Supreme Court intended to give retroactive application to its Loger ruling. Standing alone, "[d]ecisional changes in the law, even involving an interpretation of the Constitution, do not justify relief by habeas corpus." United States v. Rodgers, 288 F. Supp. 57, 58 (W.D. Okla.). Otherwise the writ of habeas corpus "would become a delayed motion for a new trial, renewed from time to time as the legal climate changed." Sunal v. Large, 332 U.S. 174, 182. A defendant in these circumstances must show that his conviction violated the due process clause or be denied habeas corpus relief. Klein v. Cardwell, 448 F.2d 407 (6th Cir.). This Casey has failed to do. We have considered his remaining arguments and find they are without merit.

The judgment of the trial court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

JAMES R. MANSPEAKER CLERK
BY _____ DEP. CLERK

Civil Action No. 78-F-394

KERRY DALE CASEY,	)	
	)	
Petitioner,	)	MEMORANDUM OPINION AND ORDER
	)	DENYING WRIT OF HABEAS CORPUS
vs.	)	AND DISMISSING PETITION
	)	
ALLEN AULT,	)	
	)	
Respondent.	)	

THIS MATTER is before the Court on the petition for writ of habeas corpus filed pursuant to 28 U.S.C. §2254. Upon full consideration of the petition, briefs of the parties, and the state trial and appellate record, we find the petition fails to state a claim upon which relief can be granted. The petition is, accordingly, dismissed.

I.

Petitioner is currently incarcerated in Colorado State Penitentiary, Canon City, Colorado. On February 29, 1972, petitioner was convicted, by way of jury verdict, of first degree murder in Adams County District Court, Action No. C-4004. On appeal, the conviction was affirmed by the Colorado Supreme Court, People v. Casey, 185 Colo. 58, 521 P.2d 1250 (1974).

On July 9, 1975, petitioner filed a motion for post-conviction relief under Rule 35(b), C.R.Crim.P., in the state district court. Relief was denied. This denial was upheld by the Colorado Supreme Court on March 21, 1977. Subsequently, on May 9, 1977, the supreme court's opinion was modified, and as modified, a petition for rehearing was denied.

The issue raised before this Court centers on a manslaughter instruction given at petitioner's trial (instruction 12). Petitioner argues he was denied his Fifth, Sixth, and Fourteenth Amendment rights by: 1) The giving of the erroneous manslaughter instruction; 2) the refusal of the Colorado Supreme Court to consider on appeal the argument that the instruction was erroneous; 3) the supreme court ruling that the instruction was not plain error; 3) the trial court's denial, and the supreme court's affirmance thereof, of the motion for post-conviction relief.

In part, this case involves the interplay between various Colorado decisions and their impact on the rulings by the trial and supreme court in denying petitioner relief. A chronological summary of the case law and events is perhaps the best way to review the case before us.

At petitioner's trial, an instruction was given defining the lesser offenses of voluntary and involuntary manslaughter. That instruction, instruction 12, stated:

> The jury is instructed, that manslaughter is the unlawful killing of a human being without malice either expressed or implied, and without any mixture of deliberation whatever. Manslaughter is either voluntary, or involuntary. In cases of voluntary manslaughter there must be a serious and highly provoking injury inflicted upon the person killing, or an attempt by the person killed to commit a serious personal injury on the person killing. The killing must be the result of that sudden violent impulse of passion supposed to be irresistible; for if there should appear to have been an interval between the assault or provocation given and the killing sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge and punished as murder. Involuntary manslaughter consists in the killing of a human being without intent to do so; in the commission of an unlawful act, or a lawful act which might probably produce such a consequence in an unlawful manner. Where the involuntary killing occurs in the commission of an unlawful act which in its consequences naturally tends to destroy life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder.

No objections were raised as to this instruction at trial or in the motion for new trial.

Following petitioner's conviction, but prior to any decision on appeal, the case of People v. Morant, 179 Colo. 287, 499 P.2d 1173 (1972), was decided. One of the issues on appeal in that case involved the propriety of a voluntary manslaughter instruction, which read:

> You are instructed that manslaughter is the unlawful killing of a human being without malice, either expressed or implied, and without any mixture of deliberation whatever.
>
> In cases of voluntary manslaughter there must be a serious and highly provoking injury inflicted upon the person killing, or an attempt by the person killed to commit a serious personal injury on the person killing. The killing must be the result of that sudden violent impulse of passion supposed to be irresistible; for if there should appear to have been an interval between the assault or provocation given and the killing sufficient for the voice of reason and humanity to be heard, the killing shall be attri-

murder.

> Where the killing occurs in the commission of an unlawful act which in its consequences naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder. . . .

499 P.2d at 1174-75. No instruction was given on involuntary manslaughter. However, the last sentence of the above instruction had been taken from the statutory definition of involuntary manslaughter. The supreme court found the inclusion of this last sentence to be plain error with respect to the voluntary manslaughter.

In petitioner's appeal to the Colorado Supreme Court, numerous issues were raised. For the first time, defendant challenged the manslaughter instruction. In his brief on appeal, it was argued that the instruction was erroneous in light of the decision in People v. Morant, supra. In the supreme court's affirmance of the conviction, they stated:

> Concerning the other jury instructions [including the manslaughter instruction] which defendant now claims were erroneous, no specific objection was made prior to their submission to the jury as required by Crim.P. 30. Absent plain error, we will not consider these arguments on appeal. Crim.P. 52(b). Instructions should be considered as a whole. [citation omitted]. After examining all of the instructions, we do not find plain error in the giving of any of the instructions. Also, we point out that all of the instructions when considered together, present to the jury an adequate and correct guideline on the law to be applied under the facts of this case.

People v. Casey, 521 P.2d at 1253.

Following the supreme court affirmance in Casey, the case of People v. Loger, 188 Colo. 291, 535 P.2d 210 (1975), was decided. Loger was also an appeal from a first degree murder conviction. The supreme court found a manslaughter instruction, identical to that given in Casey, to be plain error. The court relied heavily on the case of People v. Morant, supra, as a basis for the decision.

In light of the Loger decision, petitioner filed his motion for post-conviction relief. In the May 9, 1977 supreme court decision, the court stated:

> The issue presented here was considered and resolved by this court in the previous appeal. A defendant is not entitled to a second appeal on the same issue. [citation omitted].

> since the announcement of the previous People v. Casey, supra, we announced People v. Loger, 188 Colo. 291, 535 P.2d 210 (1975), in which we held, under the particular facts there presented, that the giving of a similar instruction was plain error, thus requiring reversal and remand for a new trial.
>
> We reject defendant's argument that because of our holding in People v. Loger we should now reconsider the issue in his case pertaining to jury instruction 12. People v. Loger is not authority for abandoning the prohibition against a second appeal on the same issue.

Thus, we find the situation where the Colorado Supreme Court was presented an argument on appeal in the Casey case which it rejected. One year later, the supreme court accepted the same argument in Loger, and subsequently refused to apply the logic of Loger to Casey in the motion for post-conviction relief.

The first issue is whether petitioner was entitled to the benefit of the Loger decision in his motion for post-conviction relief. Rule 35(b) is "not a substitute for appeal or writ of error, but is a vehicle for correcting errors of constitutional magnitude which were not previously raised and ruled upon." People v. Shearer, 181 Colo. 237, 508 P.2d 1249, 1253 (1973) (emphasis added). We find that the supreme court did consider the issue concerning the manslaughter instruction on direct appeal. Further, the court applied the appropriate test for review. We fail to comprehend petitioner's argument that the supreme court did not consider the challenged instruction in the specific factual and legal context presented in Casey. Inherent in a review for plain error is consideration of the specific factual and legal underpinning of the case.

Although the supreme court could arguably have applied Loger to Casey on the motion for post-conviction relief, it was not constitutionally required to do so. A state is not required to apply the decisions of its highest courts retroactively to prior cases or "intermediate transactions."[1] Wainwright v. Stone, 414 U.S. 21 (1973); Klein v. Cardwell, 448 F.2d 407 (6th Cir. 1971); Whalen v. Johnson, 438 F. Supp. 1198 (E.D. Mich. 1977); United States v. Rodgers, 288 F. Supp. 57 (W.D. Okla. 1968). Cf. United States v. Bensinger, 507 F.2d 103 (7th Cir. 1974); Bizup v. Tinsley, 316 F.2d 284 (10th Cir. 1963).

---

1. We disagree with petitioner's argument that the Morant decision makes a "retroactivity" argument inapplicable. First, Morant was decided after petitioner's conviction. Second, the precise holding in that case was not dispositive of the issue raised in Casey.

in the state court trial or appellate procedure. Further, due process does not require application by the Colorado Supreme Court of the Loger decision to the petitioner's case, despite the similarities between cases.

III.

The next issue is whether the instruction was, in fact, so erroneous as to entitle petitioner to habeas corpus relief. A classic statement of the role of federal courts in habeas corpus actions challenging state convictions is found in Hammil v. Tinsley, 202 F. Supp. 76 (D. Colo. 1962):

> . . . "habeas corpus is not available as a method of reviewing mere errors of State law and habeas corpus in a Federal court can be used only to determine if proceedings in a State court amount to a violation of the Federal Constitution of such a consequence as to vitiate the jurisdiction of the State court." [citation omitted]. It is a fundamental rule that "the admissibility of evidence, sufficiency of evidence, and instructions to the jury in state trials are matters of state law and procedure not involving federal constitutional issues. It is only in circumstances impugning fundamental fairness or infringing specific constitutional protections that a federal question is presented. The role of a federal habeas corpus petition is not to serve as an additional appeal." [citation omitted].

Id. at 78. See also Gillihan v. Rodriguez, 551 F.2d 1182 (10th Cir. 1977); United States v. Bensinger, supra; Lorraine v. United States, 444 F.2d 1 (10th Cir. 1971); Lincharger v. Oklahoma, 404 F.2d 1092 (10th Cir. 1968), cert. denied, 394 U.S. 938 (1969); Pierce v. Page, 362 F.2d 534 (10th Cir. 1977); Dizup v. Tinsley, supra; Alexander v. Daughtery, 286 F.2d 645 (10th Cir. 1961); Bradshaw v. Oklahoma, 398 F. Supp. 838 (E.D. Okla. 1975); McInnes v. Anderson, 366 F. Supp. 983 (E.D. Okla. 1973); United States v. Rodgers, supra.

We have reviewed the manslaughter instruction, as well as the totality of the instructions given at trial. While we agree that the last sentence of the manslaughter instruction is not a "vision of clarity," the instruction, when read as a whole and in relation to the other instructions in the case, adequately apprised the jury of the proper law to be applied. We find that the challenged instruction was not so prejudicial and unfair as to deny petitioner a fair trial in the federal constitutional sense.

ORDER

The Petition for Writ of Habeas Corpus is DENIED and the Petition is DISMISSED.

DATED at Denver, Colorado, this 6 day of July, 1978.

BY THE COURT:

Sherman G. Finesilver

SHERMAN G. FINESILVER, JUDGE
United States District Court

ENTERED
ON THE DOCKET

JUL 10 1978

JAMES R. MANSPEAKER
CLERK
BY yk

IN THE SUPREME COURT OF COLORADO

NO. 25579

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellee,

v.

KERRY CASEY,

Defendant-Appellant.

MAY 6, 1974

Appeal from the District Court of the County of Adams

Hon. Abraham Bowling, Judge

EN BANC

RULING AFFIRMED

John P. Moore, Attorney General, John E. Bush, Deputy Attorney General, Patricia W. Robb, Assistant Attorney General, for plaintiff-appellee.

Rollie R. Rogers, Colorado State Public Defender, James F. Dumas, Jr., Chief Deputy State Public Defender, Lee Belstock, Deputy State Public Defender, for defendant-appellant.

Mr. Justice Hodges delivered the opinion of the Court.

The defendant was convicted of first-degree murder. On appeal, he urges reversal on the ground that the trial court erred in several respects. We find no reversible error and therefore affirm.

The evidence in brief reveals that the defendant and the victim had been drinking at a bar. They left the bar in the victim's automobile. The victim got out of the car on a country road and the defendant got behind the wheel and sped away. He drove a short distance, made a U-turn, and returning at a high rate of speed, struck and killed the victim in a field just off the side of the road. The defendant contended that he was provoked by a sexual advance; that he only intended to scare the victim; and that he was intoxicated at the time.

I.

The defendant argues that the trial court erred in failing to suppress two statements made by him to investigating police officers. After a hearing on the motion to suppress, the trial court determined that the statements were knowingly and voluntarily made, and accordingly denied the motion to suppress. Cass v. People, 177 Colo. 232, 493 P.2d 654 (1972).

The main thrust of defendant's argument is that he did not make an intelligent waiver of his Miranda rights because he was not properly informed that he was under arrest for murder. Prior to the first statement, he was informed that he was under investigation concerning the "vehicular homicide." Prior to the second statement, he was additionally advised that his activities concerning the death of the victim on April 1, 1971 at approximately "104th Avenue and Teller Road" were being investigated.

We have previously held that the interrogating officer may not know the exact charge when the interrogation occurs prior to the formal complaint; nevertheless, it is sufficient if the accused knows the general nature of the crime involved. People v. Weaver, Colo., 500 P.2d 980 (1972) and Carroll v. People, 177 Colo. 288, 494 P.2d 80 (1972). The record here reveals that from the time of his arrest shortly after the killing, the defendant was fully aware of the nature of the crime involved.

Defendant further argues that Crim. P. 5 (requiring that the accused be taken before the magistrate without undue delay), was not complied with and therefore statements made prior to his appearance before a county judge on the day following the vicim's death are inadmissable.

Admittedly, the two statements were made prior to his appearance before the magistrate. However, the defendant was taken before the judge on the afternoon following the evening of his arrest. This is not an unreasonable delay and is clearly distinguishable from the six-day delay which we held unreasonable in Hervey v. People, 178 Colo. 38, 495 P.2d 204 (1972).

Furthermore, we have held that even if there was non-compliance with Crim. P. 5, the statements are not automatically invalid. People v. Weaver, supra, purpose of the rule is to assure that the defendant is adequately informed of his rights. Here, the investigating officers twice gave the defendant all the advisements required before he made any statement.

II.

The defendant contends that he was denied equal protection of the laws because of the impeachment of his testimony by a prior felony conviction which was committed more than five years prior to his court testimony in this case. C.R.S. 1963, 154-1-1 provides for impeachment by felony convictions over five years old in criminal but not civil cases. We have previously rejected this argument. Velarde v. People, Colo., 500 P.2d 125 (1972); Taylor v. People, 176 Colo. 316, 490 P.2d 292 (1971); Lee v. People, 170 Colo. 268, 460 P.2d 796 (1969). Also, contrary to defendant's assertion, the jury was properly instructed on the limited use of this testimony in Instruction No. 18.

III.

The defendant states that the trial court erred in admitting into evidence Exhibit H, a photograph of the deceased taken a short time after the killing.

Defendant relies heavily on Archina v. People, 135 Colo. 8, 307 P.2d 1083 (1957) in which we held photographs of the deceased inadmissable. Here, defendant argues that the large color photograph of the deceased was highly inflamatory and had little probative value because there was no serious dispute as to the identity of the victim.

We have previously held that unless there is an abuse of discretion, the trial court's decision as to admissibility will not be disturbed on review. Hinton v. People, 169 Colo. 545, 458 P.2d 611 (1969). Fully applicable here is our statement in Carroll v. People, supra, as follows:

> "We do not find the attorney general's argument as to probative value persuasive. However, we conclude that Exhibit C was not so inflamatory that it would prejudice the jury. None of the three exhibits approaches the horror of those in Archina."

IV.

Next, the defendant argues that the evidence was insufficient to support the jury's verdict of first-degree murder. While admitting that the evidence was sufficient to convict him of voluntary manslaughter or second-degree murder, defendant claims that there was not proof of express malice required for a con viction of first-degree murder.

The defendant testified that he was sexually assaulted by the victim and he then hit the victim over the head with a wine bottle. The victim stopped the car, got out and the defendant drove the victim's car away. After turning around, the defendant drove the car off the road at high speed and onto the adjacent field where the victim was walking. All the evidence is strongly indicative of the fact that the defendant aimed the vehicle at the victim and struck him. The defendant did not apply brakes nor did he stop immediately after striking the victim. We hold that the evidence is sufficient to show express malice and to support the jury's verdict. Hampton v. People, 171 Colo. 153, 465 P.2d 394 (1970).

V.

The defendant maintains that the court erred in giving certain instructions to the jury. Prior to the submission of the instructions to the jury, the defendant objected to instruction No. 13 which explains intoxication and its effect on the element of specific intent. This instruction is the same instruction given and approved in Watkins v. People, 158 Colo. 484, 408 P.2d 425 (1965). In this regard, it is the defendant's position that since intoxication was one of the defendant's theories of defense, the court should have given defendant's tendered instruction regarding intoxication. We have examined Instruction No. 13 and hold that it adequately and properly instructed the jury on this subject in this case, and that defendant's tendered instruction was correctly rejected.

Concerning the other instructions which defendant now claims were erroneous, no specific objection was made prior to their submission to the jury as required by Crim. P. 30. Absent plain eror, we will not consider these arguments on appeal. Crim. P. 52(b). Instructions should be considered as a whole. Hinton v. People, supra. After examining all the instructions, we do not find plain error in the giving of any of the instructions. Also, we point out that all of the instructions when considered together, present to the jury an adequate and correct guideline on the law to be applied under the facts of this case.

VI.

The defendant argues that the district attorney erroneously introduced evidence of possible attempted robbery of the victim and defendant was not charged with felony murder. No objection was made to this testimony, nor was it alleged as error in defendant's motion for a new trial. We will not consider it for the first time on appeal. People v. Chavez, Colo., 500 P.2d 365 (1972). We also take note of the fact that if the theory of robbery ws introduced at all as an issue in this case, the defendant further developed it by cross-examination, and in the presentation of his case. As a matter of strategy, it appears that the defendant wanted the evidence to show that there was no attempted robbery and therefore there was no motive for murder.

VII.

The defendant urges error in allowing a death qualified jury to be selected in this case. In this respect, the defendant argues that a death qualified jury is conviction prone, and thus, such a jury deprives an accused of a fair trial in violation of the Fourteenth Amendment to the Constitution of the United States. This argument has been considered and rejected by this court in Carroll v. People, supra, and Hampton v. People, supra. See also People v. Maestas, Colo., 517 P.2d 461 (1973). Defendant states that two recent studies which he cites provides empirical proof that a death qualified jury is more conviction prone. We do not find these studies decisive on the subject. See People v. Murphy, 8 Cal. Rptr. 138, 503 P.2d 594 (1972).

Judgment affirmed.

Mr. Chief Justice Pringle does not participate.

IN THE SUPREME COURT OF COLORADO

NO. 27061

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

KERRY DALE CASEY,

Defendant-Appellant.

MAR 21 1977

Appeal from the District Court of the County of Adams

Hon. Abraham Bowling, Judge

EN BANC

RULING AFFIRMED

J. D. MacFarlane, Attorney General,
Jean E. Dubofsky, Deputy Attorney General,
Edward G. Donovan, Solicitor General,
Lynne Ford, Assistant Attorney General,

Attorneys for Plaintiff-Appellee.

Rollie R. Rogers, Colorado State Public Defender,
James F. Dumas, Jr., Chief Deputy State Public Defender,
Forrest W. Lewis, Deputy State Public Defender,

Attorneys for Defendant-Appellant.

MR. JUSTICE HODGES delivered the Opinion of the Court.

This defendant's conviction of first-degree murder was previously appealed to this court. In People v. Casey, 185 Colo. 58, 521 P.2d 1250 (1974), we affirmed that conviction.

Thereafter, defendant filed a motion for post conviction relief pursuant to Crim. P. 35(b). The trial court was urged to reverse the judgment of conviction and to order a new trial on the sole ground that jury instruction No. 12, which defined manslaughter, was defective. The motion further asserts that the giving of this instruction deprived the defendant of his liberty without due process of law. The trial court denied this 35(b) motion. It is from this ruling that the defendant now appeals. We affirm.

Jury instruction No. 12 was made an issue by the defendant in his previous appeal. Because the trial record established that the defendant made no objection when this instruction was given, and because the defendant did not mention instruction No. 12 in his motion for a new trial, he argued in his previous appeal that the giving of this jury instruction was plain error.

Crim. P. 30 requires a specific objection at trial before alleged errors concerning an instruction may be considered on appeal. The only exception to this is spelled out in Crim. P. 52(b) which provides that such

a matter may be considered on appeal if it is plain error.

In the previous People v. Casey, supra, we specifically noted the matters referred to in the foregoing paragraph and with reference thereto held:

> "After examining all of the instructions, we do not find plain error in the giving of any of the instructions. Also, we point out that all of the instructions when considered together, present to the jury an adequate and correct guideline on the law to be applied under the facts of this case."

The issue presented here was considered and resolved by this court in the previous appeal. A defendant is not entitled to a second appeal on the same issue. People v. Shearer, 181 Colo. 237, 508 P.2d 1249 (1973).

We are not unmindful of the fact that since the announcement of the previous People v. Casey, supra, we announced People v. Loger, 183 Colo. 291, 535 P.2d 210 (1975), in which we held, under the particular facts there presented, that the giving of a similar instruction was plain error, thus requiring reversal and remand for a new trial.

We reject the defendant's argument that because of our holding in People v. Loger we should now reconsider the issue in his case pertaining to jury instruction No. 12. People v. Loger is not authority

for abandoning the prohibition against a second appeal on the same issue.

The trial court's ruling, which denied the defendant's 35(b) motion, is affirmed.

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79-6672

United States Court of Appeals

For the Tenth Circuit

KERRY DALE CASEY, Petitioner-Appellant, v. ALLEN AULT, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS, Respondent-Appellee.	)	Civil Action No. 78-1618

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Kerry Dale Casey, the Petitioner-Appellant above named, hereby appeals to the Supreme Court of the United States from the final order affirming the denial of a writ of habeas corpus entered in this action on February 27, 1980.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

Gene Beville
Counsel for Petitioner-Appellant
Twelve Twenty Monaco Parkway
Denver CO 80220
377 4161

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above was deposited in the U.S. Mails, postage prepaid, this 25th day of May, 1980, addressed to:

J.D. MacFarlane, Attorney General
1525 Sherman St.
Denver CO 80203

CERTIFICATE OF FILING

I hereby certify that the foregoing Notice of Appeal was filed with the clerk of the United States Court of Appeals for the Tenth Circuit on the 27th day of May, 1980.

INSTRUCTION NO. 12

The jury is instructed, that manslaughter is the unlawful killing of a human being without malice either expressed or implied, and without any mixture of deliberation whatever. Manslaughter is either voluntary, or involuntary. In cases of voluntary manslaughter there must be a serious and highly provoking injury inflicted upon the person killing, or an attempt by the person killed to commit a serious personal injury on the person killing. The killing must be the result of that sudden violent impulse of passion supposed to be irresistible; for if there should appear to have been an interval between the assault or provocation given and the killing sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge and punished as murder. Involuntary manslaughter consists in the killing of a human being without intent to do so; in the commission of an unlawful act, or a lawful act which might probably produce such a consequence in an unlawful manner. Where the involuntary killing occurs in the commission of an unlawful act which in its consequences naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder.

The trial court instructed the jury on manslaughter as follows:

"[M]anslaughter is the unlawful killing of a human being without malice either expressed or implied, and without any mixture of deliberation whatever. Manslaughter is either voluntary, or involuntary. In cases of voluntary manslaughter there must be a serious and highly provoking injury inflicted upon the person killing, or an attempt by the person killed to commit a serious personal injury on the person killing. The killing must be the result of that sudden violent impulse of passion supposed to be irresistible; for if there should appear to have been an interval between the assault or provocation given and the killing sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge and punished as murder. Involuntary manslaughter consists in the killing of a human being without intent to do so; in the commission of an unlawful act, or a lawful act which might probably produce such a consequence in an unlawful manner. Where the involuntary killing occurs in the commission of an unlawful act which in its consequences naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder."

People v. Lorer, 188 Colo. 231, 535 P.2d 210 (1975).

INSTRUCTION NO: 14

You are instructed that while the defendant is charged in this information with murder in the first degree, you may find a verdict of murder in the first degree, or murder in the second degree, or voluntary manslaughter, or involuntary manslaughter, or not guilty -- as in your judgment the evidence may warrant.

152 If you find from the evidence beyond a reasonable doubt that the killing was unlawful, felonious and with express malice, also that it was with premeditation and deliberation, this is murder in the first degree and so your verdict should be; if you find from the evidence beyond a reasonable doubt that the killing was unlawful, felonious and with implied malice but without premeditation and deliberation, this is murder in the second degree and so your verdict should be; if you find from the evidence beyond a reasonable doubt that the killing, though unlawful and felonious, was without malice, either express or implied, this would be voluntary manslaughter and so your verdict should be; if you find from the evidence beyond a

153 reasonable doubt that the killing was unintentional, but done in the commission of an unlawful act, or a lawful act which probably might produce such a consequence in an unlawful manner, this is involuntary manslaughter, so your verdict should be; if you find from the evidence that the defendant is not guilty of the offenses submitted to you, then your verdict should be not guilty.

People v. Casey: FROM THE RECORD ON APPEAL IN CASEY V. AULT, UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, NO. 78-1818

INSTRUCTION NO. 16

The defendant is charged in this information with murder in the first degree, but you may find a verdict of murder in the first degree, or murder in the second degree, or voluntary manslaughter, or involuntary manslaughter, or not guilty -- as in your judgment the evidence may warrant.

If you find from the evidence beyond a reasonable doubt that the killing was unlawful, felonious and with express malice, also that it was with premeditation and deliberation, this is murder in the first degree and your verdict should so be; if you find from the evidence beyond a reasonable doubt that the killing was unlawful, felonious and with implied malice but without premeditation and deliberation, this is murder in the second degree and your verdict should so be; if you find from the evidence beyond a reasonable doubt that the killing, though unlawful and felonious, was without malice, either express or implied, this would be voluntary manslaughter and your verdict should so be; if you find from the evidence beyond a reasonable doubt that the killing was unintentional, but done in the commission of an unlawful act, or a lawful act which probably might produce such a consequence in an unlawful manner, this is involuntary manslaugher, and your verdict should so be; if you find from the evidence that the defendant is not guilty of the offenses submitted to you, then your verdict should be not guilty.

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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1979

No. 79-6672

ORIGINAL COPY

KERRY DALE CASEY,

Appellant,

v.

ALLEN AULT, Executive Director,
Colorado Department of Corrections,

Appellee.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1979

No. _____

KERRY DALE CASEY,

Appellant,

v.

ALLEN AULT, Executive Director,
Colorado Department of Corrections,

Appellee.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

Pursuant to Supreme Court Rule 16, the appellee requests that this appeal be dismissed, or that the judgment of the United States Court of Appeals for the Tenth Circuit be summarily affirmed.

In support of these motions, the appellee states that:

1) Dismissal of the appeal is required because the decision below affirmed the denial of a federal habeas-corpus petition following the defendant-appellant's conviction of first-degree murder in the Colorado state courts. The defendant-appellant had sought habeas-corpus relief on the basis that an allegedly erroneous instruction defining included

offenses had denied him due process of law. The federal courts rejected this argument without determining any Colorado statute to be "invalid as repugnant to the constitution, treaties, or laws of the United States." Such a determination of repugnancy is the basis for appellate jurisdiction pursuant to 28 U.S.C. 1254(2), cited by the defendant-appellant as the instant basis for jurisdiction.

This court is not required to review this matter on appeal. Habeas-corpus questions are reviewable on certiorari rather than on appeal. E.g., Ex parte Quirin, 317 U.S. 1 (1942).

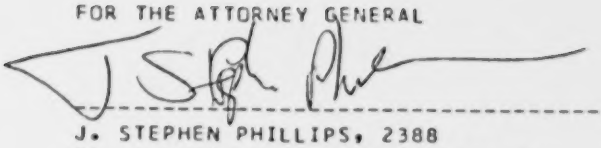
2) Alternatively, summary affirmance of the judgment is appropriate because the questions on which the decision of the cause depends are so insubstantial as not to need further argument. As set forth in the opinion of the Court of Appeals for the Tenth Circuit, appended to the appellant's jurisdictional statement, two issues were decided by that court, both on the basis of well-established precedent:

A) The challenged instruction did not violate the defendant's due-process rights. See Cupp v. Naughten, 414 U.S. 141 (1973).

B) A state is not required to apply a rule of law retroactively. Wainwright v. Stone, 414 U.S. 21 (1973).

For these reasons, the appeal should be dismissed or the judgment of the Tenth Circuit Court of Appeals should be affirmed.

FOR THE ATTORNEY GENERAL



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AG Alpha No. CO PE GCCY
AG File No. DLI/CASEY/ILA

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within MOTION TO DISMISS OR AFFIRM upon all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado this 26th day of June 1980, addressed as follows:

Gene Beville
1220 Monaco Parkway
Denver, Colorado 80220

Ellen Kersten

AG File No. BLI/CASEY/C

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

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No. 79-6672

KERRY DALE CASEY, Appellant
v.
ALLEN AULT, EXECUTIVE DIRECTOR,
COLORADO DEPARTMENT OF CORRECTIONS, Appellee

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No. 79-6672

KERRY DALE CASEY, Appellant

v.

ALLEN AULT, EXECUTIVE DIRECTOR,
COLORADO DEPARTMENT OF CORRECTIONS, Appellee

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Appellant concedes that this appeal to the Supreme Court is improvidently taken and that the proper mode for a review is by petition for certiorari and requests that the papers whereon the appeal was taken be regarded and acted on as a petition for certiorari and as if presented to the Supreme Court at the time the appeal was taken, as provided by 28 U.S.C. §2103, and prays that a writ of ceritorari issue to the United States Court of Appeals for the Tenth Circuit.

In support of the petition for certiorari, the appellant states that:

1. The court below decided federal questions in a way in conflict with applicable decisions of this Court as follows:

a. The challenged instruction violated Casey's due process and equal protection rights of the Fourteenth Amendment of the Constitution of the United States. The Colorado supreme court held, in an earlier opinion, that though the issue was raised for the first time on appeal, that the challenged instruction was plain error, was highly prejudicial, and

could have had the effect of completely nullifying the consideration by the jury of the voluntary manslaughter verdict. Notwithstanding, when the earlier opinion was cited in Casey's appeal, the state supreme court refused to consider the issue of the almost identical instruction for the first time on appeal, as absent plain error, albeit that the prejudice and nullifying effect were as great or greater in Casey. In fact, in a later case, the state supreme court held that the identical instruction given in Casey "involves error which is even more grievous than the error in [the first of the three cases]."

The erroneous instruction so infected the entire trial that the resulting conviction of first degree murder violates due process. Cupp v. Naughten, 414 U.S. 141, 146-147 (1973). The error was so prejudicial as to conflict with Casey's right to a fair trial. Chapman v. California, 386 U.S. 18, 23 (1967); Estes v. Texas, 281 U.S. 532, 543 (1965). The "highly prejudicial" instruction itself, which "could have had the effect of nullifying the consideration of the jury of the . . . manslaughter verdict", rose to the level of constitutional error. Cool v. United States, 409 U.S. 100 (1972).

Casey was denied equal protection. The federal judiciary is not bound by state rules of procedure that are unreasonable on their face or that either are unreasonably or inconsistently applied. Henry v. Mississippi, 379 U.S. 443, 448 (1965)

b. The court below erred in holding that the state was required to apply the ruling of the earlier case. Arguendo, the last of the three cases should have been applied retroactively in the circumstances here. The constitutional violation endangered the accuracy of the fact finding process and full retroactivity will be afforded. Williams v. United States, 401 U.S. 646 (1971); Henry v. Mississippi supra.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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